Supreme Court, U.S.
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No. 00-360

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

CYPRUS AMAX COAL COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CYPRUS AMAX COAL COMPANY, ET AL.

STEVEN H. BECKER
Counsel of Record
PAUL A. HOROWITZ
COUDERT BROTHERS
1114 Avenue of the Americas
New York, New York 10036-7703
(212) 626-4400

Counsel for Respondents
Cyprus Amax Coal Company, et al.

Of Counsel
JAMES R. ATWOOD
KEITH A. NOREIKA
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000

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QUESTIONS PRESENTED

1. Whether the Federal Circuit correctly ruled that parties bringing suit for restitution for the government's violation of the Export Clause of the Constitution may invoke the Court of Federal Claims' jurisdiction under the Tucker Act based on that self-executing, money-mandating constitutional provision, independent of the tax refund procedures contained in the Internal Revenue Code.

2. Whether the applicable statute of limitations in a Tucker Act suit founded upon the Export Clause is governed by 26 U.S.C. § 6511(a), which by its terms applies not to suits but rather to administrative claims, or by 28 U.S.C. § 2401(a), which by its terms expressly applies to civil suits against the United States.

PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

There have been two changes in ownership of the parties listed by Petitioner. First, Cyprus Amax Coal Company has been merged into RAG American Coal Company, which is owned by RAG American Coal Holding, Inc., which in turn is owned by RAG International Mining GmbH. None of these companies is publicly traded. Second, Mettiki Coal Company, Martiki Coal Company, Permac, Inc., Race Fork Coal Company, and Pontiki Coal Company are now owned by Alliance Coal, LLC, which is owned by Alliance Operating Partners, L.P., which in turn is owned by Alliance Resource Partners, L.P., a publicly traded company.

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STATEMENT

Respondents are United States producers, sellers and exporters of coal. In 1997 respondents filed separate lawsuits (which were ultimately consolidated) in the United States Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a), challenging the imposition of a federal excise tax (the "coal tax") on respondents' sales of coal for export from the United States. The coal tax was imposed pursuant to 26 U.S.C. § 4121, and although Congress generally exempts from excise taxes articles sold for export, Congress did not exempt export sales of coal. *See* 26 U.S.C. § 4221(a)(2) (providing that "no tax shall be imposed under [the Manufacturers Excise Taxes] chapter (*other than under section 4121* . . .) on the sale by the manufacturer . . . of an article . . . for export, or for resale by the purchaser to a second purchaser for export.") (emphasis added). Respondents alleged that the coal tax violates the Export Clause of the United States Constitution, which provides that "No Tax or Duty shall be laid on Articles exported from any State." U.S. CONST. art. I, § 9, cl. 5.

Based on 26 U.S.C. §§ 6532(a) and 7422(a), the government moved to dismiss the complaints of those respondents which either did not file a tax refund request with the Internal Revenue Service prior to filing suit, or which filed suit without waiting until their administrative refund requests had been denied or six months had passed without action on the part of the IRS. In an opinion of less than two pages, the Court of Federal Claims ruled that respondents' claims that were not submitted to the IRS "pursuant to statute" were barred. Pet. App. 21a. After characterizing respondents' arguments in restricted fashion, stating that "it seems clear" that respondents "rel[ied] primarily on their argument that reference to the administrative process in this case would be futile because an administrative agency cannot declare a statute unconsti-

tutional," the court concluded that 26 U.S.C. § 7422(a) does not permit an exception for cases in which a tax statute is alleged to be unconstitutional. Pet. App. 20a-21a. The court subsequently entered judgment dismissing respondents' complaints without prejudice (Pet. App. 22a), from which respondents appealed to the Court of Appeals for the Federal Circuit.

While respondents' suits were pending in the Court of Federal Claims, the coal tax was held to be unconstitutional as applied to sales for export, in a case to which respondents were not parties. *See Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466 (E.D. Va. 1998). The government did not appeal *Ranger Fuel* and, in May 2000, the Internal Revenue Service issued a notice indicating its acquiescence in that court's decision. Notice 2000-28, 2000-21 I.R.B. 1116 (May 22, 2000).

In respondents' appeal, the Federal Circuit unanimously reversed the Court of Federal Claims' dismissal of respondents' actions and remanded the cases back to the Court of Federal Claims. Pet. App. 1a-14a. Addressing an issue that it had raised *sua sponte* at oral argument, the Federal Circuit ruled that the appeal had not been rendered moot by respondents' re-filing of protective suits under 26 U.S.C. §§ 6532 and 7422(a) following the dismissal of their actions by the Court of Federal Claims. The Federal Circuit concluded that it could provide meaningful relief to respondents inasmuch as there is a six-year statute of limitations for a cause of action brought under the Tucker Act, but only a three-year period in which to file an administrative claim for a tax refund with the IRS under 26 U.S.C. § 6511(a). Pet. App. 5a-6a.

The Federal Circuit then noted, in accordance with this Court's decisions in *United States v. Testan*, 424 U.S. 392 (1976), and *United States v. Mitchell*, 463 U.S. 206 (1983), that the Tucker Act constitutes a waiver of sovereign

immunity by the United States where a party points to a complementary substantive right found in another source of federal law, such as the Constitution, which can be "fairly interpreted as mandating compensation by the Federal Government for the damages sustained." Pet. App. 6a-7a (citing *Mitchell*, 463 U.S. at 217, and *Testan*, 424 U.S. at 400). The court held that the Export Clause's unqualified proscription against export taxation necessarily implies a cause of action with a monetary remedy when taxes are imposed in contravention of the clause. The court stated: "[G]iven a fair textual interpretation, the language of the Export Clause leads to the ineluctable conclusion that the clause provides a cause of action with a monetary remedy." Pet. App. 8a. The Federal Circuit also observed that this recognition of a monetary remedy furthers the purpose of the Export Clause as articulated by the Framers—to free all exports from the burden of taxation. *Id.* The court found additional support for its conclusion as to the "money-mandating" nature of the Export Clause in this Court's decision in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), in which the Court unanimously affirmed the Federal Circuit's decision (1) holding the Harbor Maintenance Tax, 26 U.S.C. § 4461, unconstitutional as applied to exports, and (2) awarding money damages equaling the amount of taxes imposed. The Federal Circuit noted that the Court's decision in *U.S. Shoe* "makes clear that the Export Clause includes a correlative right to money damages as a remedy for its violation." Pet. App. 9a.

The Federal Circuit then held that the Export Clause provides a "self-executing cause of action that is not subject to compliance with the tax refund statute." Pet. App. 10a. In reaching this conclusion, the court analogized the Export Clause to another self-executing constitutional provision, the Compensation Clause, U.S. CONST. art. III, § 1, which prohibits the diminution of compensation paid to Article III judges during their continuance in office and gives rise to a

cause of action independent of the tax refund statute. Pet. App. 9a.[1] The Federal Circuit noted that similar to the Compensation Clause, the Export Clause speaks in absolute and unconditional terms, protects pecuniary interests, and presupposes money damages as a remedy for its violation. *Id.* at 10a. Because the Federal Circuit found that respondents had properly invoked the Court of Federal Claims' subject matter jurisdiction under the Tucker Act based on the self-executing Export Clause, it did not reach respondents' alternative argument which alleged a cause of action under the Tucker Act pursuant to the Takings Clause of the Fifth Amendment.

REASONS FOR DENYING THE WRIT

The government presents two questions as warranting review by the Court: (1) whether a taxpayer may commence an action to recover "an unconstitutional tax" without filing a claim for refund under 26 U.S.C. § 7422(a), and (2) whether an action to recover "an unconstitutional tax" is subject to the statute of limitations set forth in 26 U.S.C. § 6511(a) rather

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[1] For this latter proposition, the court cited *Hatter v. United States*, 953 F.2d 626 (Fed. Cir. 1992), a decision in which the Federal Circuit held that the Compensation Clause provided a self-executing remedy in the event of governmental violation of that Clause. On October 16, 2000, this Court granted the government's petition for writ of certiorari (No. 99-1978) with respect to a subsequent decision in *Hatter*, 203 F.3d 795 (Fed. Cir. 2000). That later decision, unlike the 1992 decision, addressed the substantive merits of the Compensation Clause claims in *Hatter*. Neither the government's petition in *Hatter* nor the Federal Circuit's 2000 decision in that case addressed either the point for which the 1992 *Hatter* decision had been relied upon below or the issues on which the government now seeks review in this case.

Accordingly, there is no need for the Court to withhold consideration of the government's petition in this case until final resolution of *Hatter* in case No. 99-1978.

than the statute of limitations set forth in 28 U.S.C. § 2401(a). According to the government, the Federal Circuit broadly "conclud[ed] that the statutory restrictions on the recovery of taxes paid to the United States are inapplicable to suits in which a taxpayer contends that the tax is unconstitutional" (Pet. 16), thus "creating an exception for an entire class of tax refund suits from the detailed tax administration provisions enacted by Congress . . ." (Pet. 23). The Federal Circuit did not, however, hold what the government asserts it held, and it did not carve out any broad exception for constitutional claims as the government suggests. On the contrary, the court's actual holding is consistent with pertinent precedents of this Court and will have very limited consequences.

1. The Federal Circuit's Decision Was Narrowly Drawn and in Accord With Pertinent Precedents of This Court, and Will Not Adversely Impact Upon the Administrative Tax Refund Procedures.

The first question presented by the government suggests that the Federal Circuit created a broad exception from the provisions of 26 U.S.C. § 7422(a) for any challenge to the constitutionality of a tax statute. In this regard, the government's petition asserts that "[t]he decision of the court of appeals in the present case . . . holds that compliance with the statutory administrative refund requirements is unnecessary when it is alleged that the tax is unconstitutional . . ." Pet. 22. The court of appeals did not so hold. Indeed, the holding of the Federal Circuit, which has been considered "the court of appeals that probably spends the most time mastering the intricacies of jurisdiction under the Tucker

Act,"[2] was far narrower, with exceedingly limited consequences for future tax litigation.

The Federal Circuit actually held that respondents' suits are cognizable under the Tucker Act independent of the tax refund statutes because they are founded upon a *self-executing* constitutional provision, the Export Clause, that is fairly interpreted as *mandating compensation*, as required by this Court's decisions in *United States v. Testan*, 424 U.S. 392 (1976), and *United States v. Mitchell*, 463 U.S. 206 (1983).[3] Although the government portrays the Federal Circuit's decision in sweeping terms as applying any time the constitutionality of a tax statute is challenged, the decision is far more limited, because self-executing, money-mandating constitutional provisions—the only constitutional provisions implicated by the court's decision—are but few in number. Only the Takings Clause of the Fifth Amendment, the Compensation Clause, and the Export Clause meet this criteria. Indeed, the Federal Circuit's reasoning is of even

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[2] *Licata v. United States Postal Service*, 33 F.3d 259, 263 (3rd Cir. 1994).

[3] In finding that the Export Clause, fairly interpreted, mandates compensation when it is violated, the Federal Circuit relied upon the language of the clause, which presupposes a monetary remedy; the purpose of the clause, which is to free exports from the burden of federal taxation; and finally, this Court's decision in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998). *See* Pet. App. 7a-9a. The government maintains that the Federal Circuit "overlooked" the fact that Congress provided that the tax at issue in *U.S. Shoe*, the Harbor Maintenance Tax, was to be treated for administration and enforcement purposes as a customs duty rather than a tax. Pet. 16. The government's assertion is both erroneous and beside the point. As the Federal Circuit correctly noted, "[t]he significance of *U.S. Shoe* lies not in the fact that the case involved a duty rather than a tax, but in its affirmance of the Export Clause as providing a cause of action for money damages." Pet. App. 12a.

narrower effect because the imposition of taxes can only rarely implicate the Takings Clause.[4]

Previous decisions of the Federal Circuit confirm that its holding below is inapplicable to suits by taxpayers founded upon other constitutional provisions. For example, the Federal Circuit has held that jurisdiction cannot lie under the Tucker Act in a suit founded upon the Fourth Amendment that challenges the assessment and collection of income taxes because "the Fourth Amendment does not mandate the payment of money for its violation." *Brown v. United States*, 105 F.3d 621, 623 (Fed. Cir. 1997). The Federal Circuit has similarly rejected claims that myriad other federal constitutional provisions are money-mandating. *See, e.g.*, *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (Due Process Clauses of the Fifth and Fourteenth

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[4] *See, e.g., 287 Corporate Center Assocs. v. Township of Bridgewater*, 101 F.3d 320, 324 n.5 (3rd Cir. 1996) ("levying taxes does not rise to the level of a Fifth Amendment taking unless it was so 'arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property . . .'") (quoting *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 24 (1916)). The instant case is one such rare instance. In view of the mandatory and unconditional language of the Export Clause, the sole express constitutional prohibition on Congress' taxing power, Congress expressly exempted virtually all exported merchandise from manufacturers' excise taxes—but not coal. *See* 26 U.S.C. § 4221(a). Congress' intentional targeting of the coal industry exposes the tax on coal exports as one which is so "arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property," thereby implicating the Takings Clause and entitling respondents to "just compensation."

The fact that the Takings Clause provides an independent basis under the Tucker Act for the Court of Federal Claims to exercise jurisdiction, and thus an independent basis upon which the decision below is sustainable, further warrants denial of the government's petition. Moreover, the broad exemption from taxation given by 26 U.S.C. § 4221(a) to products *other* than coal confirms that cases under the Export Clause will also be rare.

Amendments, Equal Protection Clause of the Fourteenth Amendment, and doctrine of separation of powers); *United States v. Connolly*, 716 F.2d 882, 887 (Fed. Cir. 1983) (First Amendment). *See also Milas v. United States*, 42 Fed. Cl. 704, 710 (1997), *aff'd without opinion*, 1999 U.S. App. LEXIS 26810 (Fed. Cir. Oct. 12, 1999) (Sixth Amendment); *Bernaugh v. United States*, 38 Fed. Cl. 538, 541 (1997), *aff'd without opinion*, 168 F.3d 1319 (Fed. Cir. 1998) (Double Jeopardy Clause of the Fifth Amendment and Excessive Fines Clause of the Eighth Amendment); and *Calhoun v. United States*, 32 Fed. Cl. 400, 405 (1994), *aff'd without opinion*, 61 F.3d 918 (Fed. Cir. 1995) (Cruel and Unusual Punishment proscription of the Eighth Amendment). Thus, in the event that a taxpayer plaintiff would attempt to invoke Tucker Act jurisdiction based on such provisions, it would find the Federal Circuit's decision below to be unavailing.[5]

The government notably does not take issue with the central underpinning of the Federal Circuit's decision, *i.e.*, its finding as to the money-mandating nature of the Export Clause in accordance with the *Mitchell* and *Testan* criteria. Nor does the government deny the self-executing nature of a cause of action under the Export Clause, for the right to a monetary remedy for the unconstitutional taxation of exports is "guaranteed by the Constitution" such that "[s]tatutory recognition [is] not necessary." *Jacobs v. United States*, 290

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[5] Nor is there any risk that the Federal Circuit's decision will "disrupt ordinary appellate practice" by funneling appeals of Constitution-based, district court tax suits involving less than $10,000 to the Federal Circuit, rather than to regional courts of appeals, as the government suggests (Pet. 13 n.9). To viably invoke a district court's jurisdiction under 28 U.S.C. § 1346(a)(2), over which the Federal Circuit has appellate jurisdiction, taxpayers would still have to point to a money-mandating provision; otherwise, their only viable recourse would be to proceed under 28 U.S.C. § 1346(a)(1), over which the regional courts of appeals, rather than the Federal Circuit, have appellate jurisdiction.

U.S. 13, 16 (1933) (discussing self-executing constitutional right to just compensation in the event of a Fifth Amendment "taking"). Instead, the government distorts the Federal Circuit's holding, claiming that it permits a wholesale "exception for cases in which taxpayers may believe that they are entitled to a refund because the statute on which the tax is based is unconstitutional." Pet. 15 (quoting decision of the Court of Federal Claims, Pet. App. 21a). Although there can be little dispute that it is the province of the courts, not the IRS, to resolve the constitutionality of a tax statute, and that no compelling purpose or national interest is served in this case by requiring respondents to pursue a futile administrative process, the Federal Circuit did not base its decision on such grounds. Thus, the government's implication that review by the Court is warranted because the Federal Circuit has paved the way for taxpayers to avoid administrative refund procedures, simply by raising a constitutional claim, is baseless.

2. The Government's Statute of Limitations Argument Rests on a Misreading of Both the Tax Code Provisions and This Court's Decisions.

In a separate line of attack, the government claims that the Federal Circuit's decision alters the applicable statute of limitations from three years to six years. Pet. 19-20. The government thus frames the second question presented as whether an action to recover "an unconstitutional tax" (once again overstating the Federal Circuit's holding) is subject to the statute of limitations in 26 U.S.C. § 6511(a), which requires administrative tax refund claims to be filed with the IRS within either three years of the filing of a tax return or within two years of the payment of the tax, instead of the statute of limitations in 28 U.S.C. § 2401(a), which requires civil suits against the United States to be filed within six years after the right of action first accrues.

Although the government asserts that the Federal Circuit "failed to address either the specific text of the applicable statutory provisions or the controlling decisions of this Court" regarding the statute of limitations (Pet. 22), the government neglects to mention that it did not raise any statute of limitations arguments before the three-judge panel, but instead belatedly raised those arguments for the first time in its petition for rehearing en banc. The government's suggestion that the Federal Circuit disregarded or ignored anything of pertinence is therefore misleading.

Moreover, the government's statute of limitations argument is flawed inasmuch as it asks the Court to find a conflict between two limitations provisions that are in fact addressing different subject matters. Specifically, the government asks the Court to override 28 U.S.C. § 2401(a), a statute of limitations applicable to *lawsuits*, with a statute of limitations under 26 U.S.C. § 6511(a) that is not applicable to lawsuits at all, but rather to *administrative* claims. Nor does the case upon which the government principally relies, *United States v. A.S. Kreider Co.*, 313 U.S. 443 (1941) (which did *not* involve a self-executing, money-mandating constitutional provision) support the government's argument that a three-year limitations period applies. The statute of limitations considered in *Kreider*, § 1113(a) of the Revenue Act of 1926 (44 Stat. 9, 116), in no way parallels 26 U.S.C. § 6511(a). Although the government characterizes § 1113(a) as the "predecessor of the current tax-refund statute of limitations in 26 U.S.C. § 6511(a)" (Pet. 20), the provisions are very different from one another. Section 1113(a) prescribed the period for bringing a *lawsuit*, providing that *suits* for the recovery of an internal revenue tax must be brought within five years from the date of the payment of the tax. *See Kreider*, 313 U.S. at 446. Thus, the Court's ruling that the five-year limitations period for bringing *suit* under § 1113(a) prevailed over the six-year limitations period for bringing suit under the Tucker Act in no way stands for the

proposition asserted by the government—that a statute of limitations for bringing an administrative claim may be engrafted onto and supersede the statute of limitations for filing suit under the Tucker Act.[6]

The other case upon which the government principally relies in its statute of limitations discussion, *United States v. New York & Cuba Mail S.S. Co.*, 200 U.S. 488 (1906), is also inapposite. The government asserts that in *Cuba Mail* the Court dismissed a Tucker Act suit seeking a refund of taxes imposed in violation of the Export Clause because the taxpayer had failed to comply with a "statutory prerequisite"—a pre-payment administrative protest—before bringing suit. Pet. 22. This is an inaccurate portrayal of *Cuba Mail*. The "statutory prerequisite" to which the government refers was in fact a long-standing *common-law* rule that there was no cause of action to recover a tax that had been voluntarily paid without duress and with no form of protest at the time of payment. The Court noted the "applicable principle" that "[w]here a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back." *Cuba Mail*, 200 U.S. at 493,

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[6] The statute of limitations provided in the Internal Revenue Code for filing *suit* has not even been triggered yet in this case. Section 6532(a) of the Tax Code, 26 U.S.C. § 6532(a), provides that no suit under 26 U.S.C. § 7422(a) for the recovery of internal revenue taxes may be begun before the expiration of six months from the filing of an administrative refund claim nor after the expiration of two years from the date on which the IRS mails notice of its decision. The IRS, however, has yet to act upon the administrative refund claims that respondents filed (after expiration of the six-month waiting period) as a protective measure during the pendency of their appeal.

494 (citations omitted). The Court simply concluded that this common-law principle applied in the Export Clause context and that it had not been abrogated by Congress. *Id.* at 495. There is no conflict whatever between *Cuba Mail* and the decision below, because, subsequent to *Cuba Mail*, Congress has in fact statutorily abrogated the "voluntary payment" rule.[7]

* * * *

The fundamental issue which gave rise to respondents' suits—the constitutionality of the coal tax under the Export Clause—was resolved in respondents' favor in *Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466 (E.D. Va. 1998), and the government has acquiesced in that decision. The remaining issue dealt with by the Federal Circuit, namely, whether respondents may invoke the Court of Federal Claims' jurisdiction independent of the refund provisions of the Internal Revenue Code, is merely one of statutory construction with limited applicability. The government is thus incorrect in describing the Federal Circuit's decision as one of "exceptional importance" (Pet. 13) which "voids the administrative prerequisites for a tax refund suit." Pet. 18. The reality, as discussed above, is that the government has mischaracterized the holding of the Federal Circuit and exaggerated its implications. The Federal Circuit's decision turned on the self-executing character of one of the very few "money-mandating" provisions in the Constitution, the Export Clause. Thus, by definition, the decision will have little impact on the operation of the refund provisions of the Tax Code. Because the Federal Circuit's decision was correctly decided and does not present an issue with

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[7] Revenue Act of 1924, ch. 234, § 1014(a), 43 Stat. 253, 343.

significant implications, review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

STEVEN H. BECKER
Counsel of Record
PAUL A. HOROWITZ
COUDERT BROTHERS
1114 Avenue of the Americas
New York, New York 10036-7703
(212) 626-4400

Counsel for Respondents
Cyprus Amax Coal Company, et al.

Of Counsel
JAMES R. ATWOOD
KEITH A. NOREIKA
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000

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